U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: May 11, 2000

CASE NO.: 1998-STA-28

In the matter of

LARRY E. EASH, SR.
Complainant

v.

ROADWAY EXPRESS, INC.
Respondent

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Procedural History

The Complainant, Larry Eash filed a complaint with the Occupational Safety & Health Administration ("OSHA"), arguing that Respondent, Roadway Express, Inc., violated Section 405 of the Surface Transportation Assistance Act ("STAA") (49 USC §31105 (a)) when it disciplined him for refusing work calls on December 10, 1997 and March 21, 1998. On July 19, 1998, the OSHA Assistant Secretary found the complaint to be without merit. On August 4, 1998, the Complainant appealed the dismissal of his complaint, and a hearing was scheduled on November 17, 1998.

Prior to the hearing date, the Respondent and the Complainant, along with his attorney, Mr. John Tucker, reached an oral Settlement Agreement. However, Mr. Eash refused to execute the Settlement Agreement when it was reduced to writing. On November 4, 1998, Attorney Tucker withdrew from the case, and Mr. Eash retained Paul O. Taylor, Esquire, as counsel. Thereafter the Company filed a Motion to Enforce Settlement Agreement, and I held a hearing on November 17, 1998.

On February 3, 1999, I granted the Company's motion to enforce the Settlement Agreement. Mr. Eash appealed the decision to the Secretary of Labor. On October 29, 1999, the Administrative Review Board found that the parties had not entered into an enforceable settlement agreement and remanded the case for a hearing on the merits on June 7 and 8, 2000.

The Respondent has filed a Motion for Summary Decision which the Complainant has objected to.

Factual History

The Complainant, Mr. Eash has worked for the Respondent, Roadway Express, Inc, since 1988 as a line haul driver. Mr. Eash claims that the Respondent violated the Surface Transportation Assistance Act by twice disciplining him for refusing two work calls.

On December 10, 1997, Mr. Eash went off duty sometime between 7:00 and 7:15 a.m. He slept from 8:00 a.m. to noon (Aff 7).[1] He could not recall doing any particular activities after he awoke except for reorganizing his garage. At 11:00 p.m. that evening, Eash sat down to watch the news and fell asleep. Eash testified in his deposition and affidavit that his intention was to request a slide as soon as he became eligible which was between 11:00 and 11:15 p.m. on December 10th. A "slide" is a local rule between the Company and the International Brotherhood of Teamster, Local No. 24 which allows a driver to request additional time off, up to eight hours, for any reason, including fatigue. A driver's entitlement to slide is conditioned upon two factors: he must have been off-duty for at least sixteen hours and he must request to slide prior to receiving a work call.

At 11:35 p.m. on December 10, 1997, Mr. Eash received a work call from Roadway dispatcher, Connie Dean. Ms. Dean told the Complainant that he was assigned to drive to Strasburg and that he had two hours to report to the Copley facility. Drivers are given two hours to report for duty after receiving a work call. Mr. Eash claims that after Connie Dean told him about his assignment, she immediately hung up and did not allow him any opportunity to respond. (Aff 7).

Mr. Eash called Ms. Dean and said that he was eligible for and wanted to request a slide. (Eash Dep. at 39, 42). He went on to explain that he had intended to request a slide but had fallen asleep. After Dean told Mr. Eash that he was not eligible to slide, Mr. Eash responded that he was "too fatigued" and "too sleepy to get into a commercial vehicle and take it down the road for [the Company]." Dean then transferred the call to the Assistant Relay Manager Jeff Olszewski. Mr. Eash claims he told Mr. Olszewski that he was too tired to drive and wanted to slide. Although Mr. Olszerski denied that Mr. Eash ever told him that he was too fatigued to drive, he did inform the Complainant that it would be unfair to allow him the opportunity to slide when he had failed to follow protocol. Because company policy provides that a driver who misses or refuses a work call will be disciplined with a written warning, Mr. Olszewski explained that in order to be fair to everybody else and to allow Mr. Eash the additional rest he requested, he would be moved to the bottom of the job board and he would receive a warning. The Complainant denied that he agreed to the warning letter but did understand he would receive a

[1] Abbreviations used in this order are as follows: Aff - Affidavit of Larry E. Eash, Complainant.

warning for refusing the work call. Mr. Eash formally protested in a written response to the company issued letter of warning which he received on December 12, 1997.

Mr. Eash's second disciplinary warning occurred when he received a work call on March 21, 1998 when he had been off duty for nearly forty-eight hours. The Local Rules negotiated between the Company and Local No. 24 entitle a driver to forty-eight hours of rest after the driver has completed six tours of duty.

On March 19, 1998, Mr. Eash completed a sixth tour and returned to the Copley facility at 1:44 a.m. and would not be subject to recall until March 21, 1998 at 1:44 a.m. On March 20, 1998 the Complainant went to bed around 9:45 p.m. but was not able to fall asleep until 11:00 p.m.

At 1:21 a.m., twenty-three minutes prior to the expiration of the Complainant's forty-eight hours off, Company Dispatcher Gary Kiser called Mr. Eash to assign him to drive to Jamestown. The Complainant agrees that he accepted the work call but claims no memory of the call. Mr. Eash says that about an hour after that call, he got up from bed to use the restroom. When he returned to bed, his wife asked him what he was doing because approximately an hour before, he had accepted a work call. The Complainant testified that after his wife reminded him of the call, he thought something was off and checked his logs as he believed that he was called back to work before his 48 hours of rest had expired.

When Mr. Eash called Mr. Kiser back around 2:24 a.m. one hour and three minutes had elapsed since the work call. Mr. Eash informed Mr. Kiser that he was fatigued and needed more time to sleep. Mr. Kiser transferred the call to Relay Coordinator Tim Doody who, having learned of the inadvertent call twenty-three minutes early, offered to reinitiate the work call and give Mr. Eash two hours to report to work form that moment, now well beyond the expiration of the forty eight hour mark. The Complainant refused to report to work.

As a result of Mr. Eash's conduct on March 21, 1998, the Company issued a warning letter for refusing two work calls on that evening. Following Mr. Eash's written protest of the warning, a hearing was held between Company representatives and Mr. Eash and his union representative. At that meeting, the parties agreed that Mr. Eash would be suspended for five days. Mr. Eash did not agree to the suspension, did not continue the protest through the grievance procedure but instead sent a written complain to OSHA protesting the December and March written warning.

Legal Analysis

Under 29 C.F.R. Part 18 § 18.40 of the Rules of Practice and Procedure for Administrative Hearings provides that an Administrative Law Judge may enter summary judgement when there is no genuine issues as to any material fact and that a party is entitled to summary decision.

The Respondent, argues that summary judgment should be granted in their favor because the Complainant cannot show that the Company violated the Surface Transportation Assistance Act by disciplining him. There is no dispute that Mr. Eash refused to take two work assignments, therefore, the ultimate issue to decide is whether under the facts presented, Mr. Eash was engaging in protected activity when he twice refused to accept the driving assignments because he was fatigued.

Because on summary decision all facts and inferences are to be reviewed in a light most favorable to the non-moving party (Eash), the motion should be assessed as if Mr. Eash's allegations and evidence are true. Therefore, the question becomes, if Mr. Eash's allegation of current and future fatigue on the two occasions are true, and if he was genuinely apprehensive of his ability to operate his vehicle safely, would the Respondent still be entitled to prevail as a matter of law?

The Board has consistently held that the STAA does not protect an employee who, through no fault of the employer, has made himself unavailable for work. *In the Matter of Albert Porter v. Greyhound Bus Lines*, 96-STA-23, Sec Dec. 12, 1998. An employee makes himself unavailable for work by not taking advantage of his time off to become rested and available to work when called. The test for violation of the fatigue rule is whether "a reasonable person in the same circumstance...would conclude that his ability of alertness would be impaired such that a violation of the fatigue rule would have occurred." *Cortes v. Lucky Stores, Inc.*, 96-STA-30.

In both circumstances in this case, the Complainant had enough time off from working to obtain a sufficient amount of rest. On December 10, 1997, Mr. Eash had been off duty for over sixteen hours and on March 21, 1998, had been off duty for 47 hours, 37 minutes before receiving the work call. On both of these dates, Mr. Eash was at the end of his prescribed leave. A reasonable person, after their prescribed company leave would be able to accept his work assignment. Mr. Eash has not provided any evidence of a special circumstance that would have hampered his ability to take the assignments, except "being tired".

The STAA protects only a driver who may unexpectedly encounter fatigue in the course of a journey. *Yellow Freight Systems, Inc. v. Reich*, 8 F.3d 980, 987 (4th Cir. 1993). Here the Complainant has testified that there were not any special circumstances that prevented him from getting sufficient rest during those two rest periods except that he had no desire to sleep or cannot make himself sleep. Mr. Eash made himself unavailable for work. Therefore, he did not as a matter of law, engage in protected activity.

The Complainant argues that Summary Judgement is precluded because there are material facts at issue. The Respondent relies on case law where the ARB disagreed with the ALJ's decision which found no material issue concerning the fatigue level of the Complainant. The ARB held that the driver's condition and his concern for safety are the key "material facts" to be decided in such a case. *Stauffer v. Wal-Mart Stores, Inc.*, 99-STA-21 (ARB Nov. 30. 1999).

The facts in the Stauffer case are significantly different than in the present case. Stauffer arrived at the Wal-Mart store with his first truck- load at mid–night and was expected to get two hours of sleep, where upon the personnel at the store would wake him up in a few hours so he could reload his truck and drive to the next destination. It is reasonable to see how Mr. Stauffer's fatigue would interfere with his ability to drive safely. He had worked all day and had minimal rest in the middle of the night. A material fact that was at issue in this case was the amount of fatigue the claimant had. Therefore, the ARB determined it could not be summarily dismissed.

However, Mr. Eash got his work assignments after he had been at home after adequate leave on both instances. His fatigue is not a material issue because as stated above even if his testimony about "being tired" is taken for the truth, the STAA does not protect drivers who deliberately make themselves unavailable for work by not taking advantage of their time off. And although it is not at issue in this summary judgment decision, the Respondent's allow their drivers an opportunity to take additional leave (a slide), if requested within a reasonable time, when they need extra rest. Mr. Eash was not able to make this request on both occasions.

As a matter of law, the Respondent is entitled to prevail even after assuming Mr. Eash's allegations of his fatigue are true, therefore I find that summary decision is warranted in this situation. The Claimant's fatigue level is not a material fact at issue in this instance because he deliberately made himself unavailable for work.

Therefore, the hearing scheduled for June 6 and June 7, 2000 is cancelled.

GERALD M. TIERNEY
Administrative Law Judge